

¹ 5 U.S.C. § 8101 *et seq.*

became aware of her injury on December 10, 2019 and realized its relation to her federal employment on March 31, 2020.

OWCP received a cervical spine x-ray report dated December 10, 2019 from Dr. Rupesh P. Patel, a diagnostic radiologist. Dr. Patel related multilevel degenerative changes.

Appellant submitted a medical report dated December 10, 2019 from Dr. Tara Rakonski, a Board-certified family practitioner. Dr. Rakonski related that appellant had neck pain on her right side, numbness and tingling of her right arm, and acute pain of her right shoulder. She concluded that appellant's conditions were work related.

OWCP received medical reports dated December 18, 2019 and January 8, 2020 from Dr. Rudolf R. Teschan, a Board-certified family practitioner. Dr. Teschan related that on December 10, 2019 appellant raised her right arm to remove mail from the processing machine and developed right shoulder pain, which radiated across her chest. He also advised that appellant had neck pain due to underlying degenerative disc disease and osteoarthritis. Dr. Teschan also provided notes of the same dates containing appellant's work restrictions.

OWCP received a magnetic resonance imaging (MRI) scan dated January 23, 2020, which demonstrated degenerative changes at C5-6 contributing to mild spinal canal stenosis and ventral indentation of the cord, as well as abnormal T2 cord signal, which could be seen with inflammatory or demyelinating conditions, vasculitis, less likely neoplasm.

In medical reports dated February 6 and 13, 2020, Dr. Teschan diagnosed C5-6 disc herniation and a C3-4 mild disc herniation, and noted appellant's work restrictions.

In a development letter dated May 12, 2020, OWCP advised appellant that additional evidence was necessary to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response to the development letter, appellant submitted work restrictions dated April 29 to May 29, 2020 from several medical providers.

In a medical report dated June 16, 2020, Dr. Teschan related that appellant had sustained right shoulder pain likely due to biceps tendinitis, chronic cervical pain, upper back and right cervical spasms, and paresthesia of the right upper extremity due to her claimed December 10, 2019 employment injury.

OWCP continued to receive reports from medical providers, which provided work restrictions through July 15, 2020.

In a report dated July 8, 2020, Dr. Kenneth W. Reichert, a Board-certified neurosurgeon, diagnosed advanced degenerative spine disease.

By decision dated July 28, 2020, OWCP denied appellant's claim, finding that there was no medical evidence containing a firm medical diagnosis in connection with the accepted

employment events. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 25, 2020 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. OWCP received additional medical evidence. An MRI scan of appellant's right shoulder dated July 13, 2020 indicated findings of right rotator cuff tear.

In a report dated August 19, 2020, Dr. Teschan opined that on December 10, 2019 appellant suffered severe pain in her right shoulder, neck, and upper back as a direct result of raising her arm above shoulder level repetitively while using a mail processing machine. He diagnosed shoulder full-thickness tear of the supraspinatus and infraspinatus tendons, with a labrum tear as a result of trauma. Dr. Teschan also attested that appellant's December 10, 2019 work injury severely exacerbated her degenerative joint disease and osteoarthritis of the cervical spine and caused her muscle spasms in the neck and upper back on the right side.

On August 26, 2020 appellant was again seen by Dr. Reichart. He diagnosed cervical foraminal stenosis and recommended anterior cervical decompression.

In an August 26, 2020 report, Dr. Robert Sean Churchill, a Board-certified orthopedic surgeon, related that appellant had a well-documented right shoulder supraspinatus rotator cuff tear. He also noted that her left upper extremity complaints were more consistent with cervical radiculopathy.

OWCP continued to receive medical reports relating to appellant's work restrictions.

By decision dated February 3, 2021, OWCP denied appellant's request for a review of the written record as untimely filed, finding that it was made more than 30 days after the July 28, 2020 merit decision OWCP further exercised its discretion and determined that the issue in this case could equally-well be addressed by requesting reconsideration before it, along with the submission of new evidence.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary."²

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats, an oral hearing or a review of the written record."³ The hearing request must

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.⁴ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.⁵ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.⁶

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for a review of the written record as untimely, filed pursuant to 5 U.S.C. § 8124(b).

OWCP's regulations provide that a request for review of the written record must be made within 30 days of the date of the decision for which a review is sought.

Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely.⁷ Otherwise, the date of the letter itself should be used.⁸

OWCP found that appellant's request for a review of the record was untimely filed as it was filed more than 30 days after the issuance of OWCP's July 28, 2020 merit decision. The Board finds, however, that the request for review of the written record was dated August 25, 2020 and OWCP did not retain any postmark or other marking evidencing the date of delivery. As the date of the request for review of the written record, August 25, 2020, was within 30 days of the July 28, 2020 decision, the request was, therefore, timely filed. Accordingly, the Board finds that OWCP improperly denied appellant's August 25, 2020 request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

⁴ *Id.* at § 10.616.

⁵ *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (September 2020). *See T.B.*, Docket No. 20-0158 (issued March 18, 2022).

⁸ *K.B.*, Docket No. 21-1038 (issued February 28, 2022); *see J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001) *citing William J. Kapfhammer*, 42 ECAB 271 (1990); *see also Douglas McLean*, 42 ECAB 759 (1991).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for review of the written record as untimely filed pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 18, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board